Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

JEFFREY BARRINGTON,

Petitioner,

v.

AARON C. ERMINE,

Respondent.

On Petition For Writ Of Certiorari To The State Of Washington Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a plaintiff, who made a $500,000 claim seeking only money damages for himself, including uncontested special damages as well as punitive and general damages, but had a jury award no damages and resulted in the trial court awarding $1 in nominal damages, is entitled to attorneys' fees pursuant to this Court's opinion in *Farrar v. Hobby*, 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992) when his suit effected no change?

2. Whether the factors set forth in one Justice's lone concurring opinion in *Farrar* may support a fee award for an entirely unsuccessful claimant?

PARTIES TO THE PROCEEDINGS

Petitioner is Jeffrey Barrington, a single man. A defendant at the trial court level, he was named fictitiously as John Doe Barrington. He was the appellant/petitioner below. The other named defendants were the City of Spokane ("City") and the marital community composed of John Doe and Jane Doe Barrington.

The Respondent is Aaron C. Ermine, who was the Plaintiff/Respondent below.

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I. PETITION FOR WRIT OF CERTIORARI

Petitioner, Jeffrey Barrington, respectfully prays that a writ of certiorari issue to review the decision of the Washington State Supreme Court discussed in Section II below.

Despite Respondent's argument below, this case is not about ensuring claimants' access to justice. Petitioner is likewise entitled to justice and the full protection afforded by this Court's opinion in *Farrar* when a claimant receives only $1 in nominal damages after being entirely unsuccessful in seeking only monetary damages for himself. The Washington State Supreme Court opinion conflicts with this Court's holding in *Farrar* and its progeny.

II. OPINIONS BELOW

On May 24, 2001 the Washington State Supreme Court affirmed the majority opinion issued by Division Three of the Washington State Court of Appeals. The courts affirmed the trial court's attorneys' fee award pursuant to 42 U.S.C § 1988 after Respondent obtained only nominal damages of $1 on his 42 U.S.C. § 1983 use of excessive force claim. *Ermine v. City of Spokane, et al.*, 143 Wash.2d 636, 23 P.3d 492 (2001). The State Supreme Court opinion appears at Appendix pp. 1-17 to this petition. The majority opinion of the Washington Court of Appeals appears at Appendix pp. 18-26 to this petition. The dissenting opinion appears at Appendix pp. 26-31.

III. JURISDICTION

The Washington State Supreme Court issued its decision on May 24, 2001. This petition is timely filed within ninety days of that date as provided in Supreme Court Rule 13.3. This Court has jurisdiction to hear the case pursuant to 28 U.S.C. § 1257(a).

IV. STATUTORY & CONSTITUTIONAL PROVISIONS INVOLVED

This case presents a federal question regarding the interpretation of 42 U.S.C. § 1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The trial court awarded attorneys' fees pursuant to 42 U.S.C. § 1988(b), which provides:

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. 1681 *et seq.*], the Religious Freedom Restoration Act of 1993 [42 U.S.C. 2000bb *et seq.*], title VI of the Civil Rights Act of

> 1964 [42 U.S.C. 2000d *et seq.*], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Respondent alleged Petitioner's use of excessive force violated his federal rights under the First, Fourth, Fifth, and Fourteenth Amendments to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

> The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself,

> nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

> **Sec. 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

V. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY: PRESENTATION OF FEDERAL QUESTION

When the Respondent filed his Complaint, he alleged, *inter alia*, a violation of 42 U.S.C. § 1983. The jury concluded that the Petitioner had used excessive force, but awarded Respondent no damages. The trial court awarded $1 in nominal damages and $9,920 in attorneys' fees pursuant to 42 U.S.C. § 1988.

The only issue on appeal has been whether or not federal case law permitted the fee award in a nominal damages case when a plaintiff sought only compensatory damages for himself and received nothing. The trial court passed on this question by stating: (1) "I think I still have

to consider the fact that the jury came back with a verdict in favor of Mr. Ermine." (2) "I still think that some fairly substantial attorney fees are appropriate." App. 30. On reconsideration, the trial court expanded its reasons, noting how "[i]f I had not considered the factor of damages, I would have granted substantially more attorney's fees." *Id.*

The majority of the Washington State Court of Appeals, Division Three affirmed the fee award. *Ermine v. City of Spokane*, 100 Wash. App. 115, 956 P.2d 624 (2000); App. 18-26. The dissenting opinion reviewed the trial court's expressed rationale for the fee award, noting how even on reconsideration the trial court could not articulate vindication of a substantial right because none existed. App. 30.

Petitioner obtained discretionary review at the Washington State Supreme Court. This state court of last resort affirmed the majority of the Washington Court of Appeals, relying on Justice O'Connor's lone concurrence in *Farrar v. Hobby*, 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1994), as well as inapposite case law from the circuits of the United States Court of Appeals that have also relied upon Justice O'Connor's concurrence. App. 1-17.

B. SUBSTANTIVE FACTS

A jury heard disputed versions of the substantive facts that gave rise to this case.[1] Respondent was a passenger in a vehicle that led Spokane Police on a dangerous and lengthy high-speed chase. App. 1-2. The

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[1] The Washington Supreme Court inappropriately focused on the rationale for the jury's decision. App. 4, n. 2; App. 14. The

vehicle became disabled after it drove over a traffic median and through a Spokane park. App. 2. The driver fled and Respondent also exited the vehicle. *Id.*

The jury heard testimony that Officer Barrington yelled at Mr. Ermine to get down on the ground, but that Respondent refused and continued towards the officer. App. 2. Officer Barrington attempted to gain control of Mr. Ermine's arm, but Respondent began to pull away and flailed his arm. *Id.* The officer was not able to gain control of Mr. Ermine to handcuff him until another officer assisted. *Id.* Respondent was then arrested for obstructing a police officer and resisting arrest. App. at 2-3.

Respondent testified that he fully complied with Officer Barrington's commands. Mr. Ermine claimed that as he began to get down, the officer grabbed him by the

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jury's rationale leading to the verdict inheres in the verdict itself. *See, e.g., United States v. Powell*, 469 U.S. 57, 65, 83 L.Ed.2d 461, 105 S.Ct. 471 (1984). There are a multitude of factors, including compromise or lenity that can lead to an inconsistent verdict. *Id.* The jury did not find assault and battery. They could have concluded that the excessive force was Petitioner yelling at the Respondent to get down while the officer's weapon was drawn; rather than the Washington courts' unsupported conclusion that the jury accepted Respondent's version of what transpired. Nevertheless, it was undisputed that the jury was properly instructed as to damages and proximate cause. The jurors are presumed to have followed those instructions when they concluded that the Petitioner did not proximately cause the undisputed medical damages and other claimed damages by awarding Respondent nothing. *Cf.*, App. 14 ("[T]here were no special interrogatories to the jury, and thus no finding that the constitutional violation did not proximately cause plaintiff's injuries.")

back of the head and slammed his face onto the pavement. App. 2. He also asserted that Petitioner said, "That will teach you to f – with the cops," while Respondent was on the ground. *Id.*

Mr. Ermine's attorney filed a $500,000 claim for compensatory damages with the City. The City's claims adjuster offered $1,000 to Mr. Ermine to settle the claim in lieu of suit.[2] Respondent filed suit in Spokane Superior Court against the City of Spokane and Officer Barrington, alleging false arrest, use of excessive force in making the arrest, assault and battery, negligence, and violation of his federal constitutional rights pursuant to 42 U.S.C. § 1983. He sought unspecified compensatory and punitive damages. Respondent never sought any injunctive or declaratory relief.

The case went to mandatory arbitration. In mandatory arbitration, the claimant seeks only money damages and any claim in excess of $35,000 is not subject to recovery. The arbitrator rejected Respondent's claim. Mr. Ermine then requested a trial *de novo* in superior court, which has no pre-set limit for recovering damages.

The parties conducted a three-day jury trial. At the close of Respondent's case, the trial court granted a directed verdict in favor of the City because there was no evidence of any unconstitutional custom, policy or practice on its part. Respondent's medical expenses in the

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[2] Shortly after filing suit, Respondent formally rejected the adjuster's offer to settle, and counter-offered for ten times the amount offered. App. 36. Throughout the proceedings, the City and Petitioner have maintained that Respondent's claim had no merit.

amount of $1,212 were not disputed; the parties disputed, however, whether the Petitioner caused any damages. Petitioner argued that the abrasions to Respondent's face were the result of his squirming on the street as he was resisting arrest. The jury was instructed, *inter alia*, as to proximate cause and damages.

The jury returned its verdict and rejected all of Mr. Ermine's claims, including assault and battery claim and false arrest, except his 42 U.S.C. § 1983 claim against Officer Barrington. It awarded zero dollars in damages. Subsequently, the trial court awarded Mr. Ermine nominal damages of $1.00 and granted Respondent's motion for attorneys' fees as a prevailing party. It awarded $9,920, half of the amount Respondent requested. In doing so, the trial court concluded, "some fairly substantial attorney fees are appropriate, and that is the basis on which I make the decision of 50 percent." The trial court denied Petitioner's motion to reconsider the fee award and Officer Barrington appealed to Division Three of the Washington State Court of Appeals. The Washington State courts resolved this federal question as set forth previously.

VI. ARGUMENT

A. REASONS WHY REVIEW SHOULD BE GRANTED

The Washington State Courts have decided an important federal question in a way that conflicts with this Court's relevant and controlling decisions. Supreme Court Rule 10(c); *Farrar v. Hobby, supra*. In doing so, it decided an important federal question in a way that conflicts with the Ninth Circuit Court of Appeals in

Wilcox v. City of Reno, 42 F.3d 550 (9th Cir. 1994). Supreme Court Rule 10(b).

B. THE WASHINGTON SUPREME COURT DECIDED A PREVAILING PARTY UNDER 42 U.S.C. § 1988 WAS ENTITLED TO AN ATTORNEYS' FEE AWARD WHEN *FARRAR* AND ITS PROGENY HOLD OTHERWISE

The opinion of this Court in *Farrar* established a two-prong test to determine whether a party is entitled to an award of attorneys' fees pursuant to 42 U.S.C. § 1988. 506 U.S. at 111-16. First, the party must establish that he or she is the "prevailing party." *Id.* at 111-12. Second, the "prevailing party" must establish a "level of success" in comparison to the actual relief sought. *Id.* 114-16; *see also McGinnis v. Kentucky Fried Chicken of Cal.*, 51 F.3d 805, 809-10 (9th Cir. 1994) (discrimination suit).

The most critical factor is the " 'degree of success obtained.' " *Farrar*, 506 U.S. at 114 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 436, 103 S.Ct. 1933, 1941, 76 L.Ed.2d 40, 52 (1983)). In discussing this concept, this Court focused on plaintiffs who fail to obtain compensatory damages, and received no more than nominal damages:

> In some circumstances, even a plaintiff who formally "prevails" under § 1988 should receive no attorney's fees at all. A plaintiff who seeks compensatory damages but receives no more than nominal damages is often such a prevailing party. . . . *When a plaintiff recovers only nominal damages* because of his failure to prove an essential element of his claim for monetary relief, see

> *Carey, supra,* at 256-257, 264, 98 S.Ct., at 1048-1049, 1052, *the only reasonable fee is usually no fee at all.*

Farrar, 506 U.S. at 115 (emphasis supplied). The only reasonable fee in this case is no fee at all.

When the relief sought is money, "the terms 'extent of success' and 'level of success' are euphemistic ways of referring to money." *McGinnis,* 51 F.3d at 810. Here, Respondent commenced the two-and-a-half year march to trial by making a claim that requested a half-million dollars to compensate him. He rejected the City's $1,000 offer to settle in lieu of filing suit. Respondent filed suit, asking for only money damages for himself. After losing at mandatory arbitration, Respondent demanded a trial at which there was no pre-set limit on damages. After a three-day jury trial, the jury awarded him no damages. The court's award of $1 in nominal damages underscores the utter failure of his suit: He actually lost $999 by going to trial.

Both Respondent and the Washington Supreme Court make much of the "modest" amount for which he asked the jury. App. 11. However, the modest request was made only *after* the trial court eviscerated his case against the proverbial "deep pocket" by directing a verdict in favor of the City after Respondent's case-in-chief. Moreover, no reasonable person would pay an attorney $9,920 to lose $999, which is what happened here. *See, McGinnis,* 51 F.3d at 810.

Irrespective of what Respondent asked the jury to award, the fact remains that he initially sought $500,000 and won $1. Contrary to Respondent's position while

seeking to salvage a fee award and the Washington Supreme Court, it was not simply "a small claim . . . tried accordingly." App. 11 (quoting *Hyde v. Small*, 123 F.3d 583, 585 (7th Cir. 1997) (ellipses in original)). Once Respondent requested a trial *de novo*, he was no longer limited to the $35,000 recovery in mandatory arbitration. Further, this case only resulted in a modest jury request because Respondent presented no evidence to support any claim for damages against the City. The trial court's dismissal of a claim that should have never been made in the first place cannot be used to artificially inflate Respondent's level of success. Simply put, the $500,000:1 recovery "aim[ed] high and fell far short" after litigating the matter for two-and-a-half years. 123 F.3d at 585.

The Washington Supreme Court recognized that this Court in *Farrar* addressed how the degree of success in some cases affects not just the amount of fees to a prevailing party, but also whether those fees are even available in the first place. App. 8. When the purpose of civil rights litigation is to recover private damages, courts are " 'obligated to give primary consideration to the amount of damages awarded as compared to the amount sought.' " *Id.* (citation omitted). *Farrar* instructs that a plaintiff who seeks compensatory damages but receives only nominal damages is often a prevailing party who should receive no fees at all. *Id.* The Court further noted how a nominal damage award "highlights the plaintiff's failure to prove actual, compensable injury." App. 9 (quoting *Farrar*, 506 U.S. at 115).

After reciting the principles of law this Court annunciated in *Farrar*, the Washington State Supreme Court relied upon Justice O'Connor's concurrence, which no

other Justice joined, and contrived to justify a fee award to which Respondent was not entitled under the majority opinion in *Farrar*. App. 10-11. The Washington Supreme Court acknowledged that Justice O'Connor's separate concurring opinion was not binding, but proceeded to apply its three-prong test to determine whether Respondent's fee award was appropriate. App. 11-17.

To justify Respondent's fee award, the Washington Supreme Court relied on inapposite federal case law in which the prevailing party sought and/or obtained relief dissimilar from the nominal damages awarded here. App. 9; *Cabrera v. Jakabovitz*, 24 F.3d 372, 379 (2d Cir. 1994) (punitive damages and jury found "largely in plaintiff's favor"); *Garcia v. City of Houston*, 201 F.3d 672 (5th Cir. 2000) (sought injunctive relief); *Hyde v. Small*, 123 F.3d 583, 585-86 (7th Cir. 1997) (remand to "look more deeply," rather than grant fee application on $500 compensatory damages – not nominal damages); *Johnson v. LaFayette Fire Fighters Ass'n Loc. 472*, 51 F.3d 726, 731 (7th Cir. 1995) (won declaratory judgment and plaintiff requested only nominal damages); *Muhammad v. Lockhart*, 104 F.3d 1069 (8th Cir. 1997) (did not ask for specific amount of damages and judgment against all defendants); *Piper v. Oliver*, 69 F.3d 875, 877 (8th Cir. 1995) (encouraged refashioning of forfeiture procedures); *Jones v. Lockhart*, 29 F.3d 422, 424 (8th Cir. 1994) ("Most importantly, Jones was awarded punitive damages."); *Morales v. San Rafael*, 96 F.3d 359, 364 (9th Cir. 1996) ($17,500 compensatory damage award against City and officer not nominal and a deterrent); *Brandau v. State of Kansas*, 168 F.3d 1179, 1183 (10th Cir.), *cert. denied*, 526 U.S. 1133 (1999) (also vindicated rights of coworkers and put employer on notice to

change sexual harassment policy); *Phelps v. Hamilton*, 120 F.3d 1126 (10th Cir. 1997) (declaratory and injunctive relief).

The Washington Supreme Court also relied heavily on *Lucas v. Guyton*, 901 F. Supp. 1047 (D.S.C. 1995). *Lucas* involved a death row inmate who brought a § 1983 claim alleging that prison guards had violated his Eighth Amendment right against cruel and unusual punishment. 901 F. Supp. at 1050. A jury found for the plaintiff and awarded him nominal damages of ten cents. *Id.* at 1051. In supporting a fee award, the court concluded:

> It is hard to imagine a more repugnant or unsympathetic client to put before a jury. . . . [T]he jury was aware that Plaintiff was on death row and could reasonably conclude that those on death row are usually there for a good reason. . . . The mere fact that the jury was able to look past these highly prejudicial and negative factors and render a verdict for Plaintiff, was far from a de minimus or pyrrhic victory.

901 F. Supp. at 1052. The *Lucas* court also stated how:

> Counsel [for the plaintiff] recognized throughout the trial that, due to the *unique nature of the case*, it was primarily about the vindication of the constitutional rights of a death row inmate. . . . Counsel for Plaintiff did not argue a dollar amount before the jury nor is one included in the Complaint. Further, *Plaintiff's counsel specifically requested and presented to the court the nominal damage jury charge.*
>
> . . .

> . . . Therefore, this court finds the jury's favorable *nominal damage verdict*, demonstrating that the jury found that Defendants maliciously and sadistically violated the Plaintiff's rights, *was exactly the relief Plaintiff sought*.

901 F. Supp. at 1053-54 (emphasis added, footnotes omitted). Conversely, this is not a unique case. Respondent was not a repugnant or unsympathetic client: He claimed that he was simply an unwitting passenger unable to get out of the car, or stop the driver from eluding the police. He also sought far more than the nominal damage award that he received.

Simply put, none of the cases the Washington State Supreme Court and Respondent relied upon change the reality that this case is exactly the type of situation that *Farrar* says cannot support a fee award. It is the classic, "merely technical," and Pyrrhic victory.

C. THIS PETITION PRESENTS THE IDEAL OPPORTUNITY TO RESOLVE THE CONFLICT AND CONFUSION AMONG THE FEDERAL CIRCUITS WITH REGARD TO THE EFFECT OF JUSTICE O'CONNOR'S LONE CONCURRENCE IN *FARRAR*

This case highlights the problem presented by the Washington State Courts' reliance on Justice O'Connor's concurrence as the opinion of this Court in *Farrar*:

> "As narrowed by Justice O'Connor's concurring opinion, therefore, *Farrar* essentially holds that failure to recover more than nominal damages in a § 1983 action is a Pyrrhic or technical victory only when the action serves no public purpose."

App. 24 (quoting *Gudenkauf v. Stauffer Communications, Inc.*, 158 F.3d 1074, 1078 (10th Cir. 1998)). The Tenth Circuit itself recently acknowledged how different courts are treating Justice O'Connor's test set forth in her *Farrar* concurrence differently. *Barber v. T.D. Williamson, Inc.*, 254 F.3d 1223, 1230-33 (10th Cir. July 2, 2001).

1. This case illustrates the deviation from *Farrar* when a court applies one Justice's three-part test instead of focusing primarily on the claimant's level of success as the majority opinion in *Farrar* requires.

The Ninth Circuit noted the conflict among the federal circuits, and rejected the Tenth Circuit's attempt to explain the *Farrar* Court's use of "usually" when it stated that usually the only reasonable fee is no fee at all in nominal damage cases. *Norris v. Sysco Corp.*, 191 F.3d 1043, 1051 (9th Cir. 1999). The *Norris* court stated how: "*Gudenkauf* does seem to go somewhat further when it declares that even in the face of nominal, *de minimis*, or no relief a plaintiff should 'ordinarily' recover fees." 191 F.3d at 1051 (quoting *Gudenkauf*, 158 F.3d at 1081).

The Ninth Circuit adopted the approach set forth in *Sheppard v. Riverview Nursing Ctr., Inc.*, 88 F.3d 1332, 1334 (4th Cir. 1996) (mixed motive discrimination case in which plaintiff established a Title VII violation *and declaratory relief*, but the jury awarded no damages because Sheppard would have been laid off anyway). In rejecting *Gudenkauf*, the Ninth Circuit stated:

> Perhaps in the long run, *Gudenkauf's* 'ordinarily' will rarely yield a result different from *Sheppard's* 'proportionality,' but to the extent that it would, we are satisfied that *Sheppard* states the correct rule. Its approach is faithful to the concerns of both the Supreme Court and Congress.

Norris, 191 F.3d at 1051. This case illustrates the deviation from *Farrar* when courts apply the three-part test in Justice O'Connor's concurrence instead of focusing primarily on the level of success (*i.e.*, proportionality) as the majority opinion in *Farrar* requires.

2. 42 U.S.C. § 1988 is not a relief act for lawyers: Given the relief sought and Respondent's utter lack of success, the only person who benefited from this case was Respondent's attorney.

The *Sheppard* court noted that factoring proportionality into the fee analysis helps guard against the result in which the lawyers receive the primary benefit. 88 F.3d at 1336. As with the court in *Sheppard*, the Ninth Circuit expressed doubt as to "the efficacy of primarily benefiting lawyers where 'relief to the plaintiff is otherwise trivial and the lawsuit promotes few public goals.' " *Id.* (quoting *Sheppard*, 88 F.3d at 1336).

The Washington Supreme Court correctly noted that § 1988 is not, " 'a relief Act for lawyers,' " but can be a tool by making fees available under a private attorney general theory. App. 15 (citing *Farrar*, 506 U.S. at 122 (O'Connor, J., concurring) (quoting *City of Riverside v. Rivera*, 477 U.S. at 588 (Rehnquist, J., dissenting)). Unlike the cited cases, which involved declaratory or injunctive

relief, Respondent's case involved no such private attorney general claims. Respondent sought only to benefit himself financially and failed; the only person who benefited was Respondent's lawyer.

As the Washington Supreme Court appropriately noted, Respondent's assertion that the cumulative effect of small claims vindicating civil rights to be free from excessive force serves an important public goal is misplaced because it "could be applied to virtually any constitutional violation. . . . " App. 15-16. The court in *Briggs v. Marshall*, 93 F.3d 355 (7th Cir. 1996) recognized this concept:

> "[G]iven that § 1983 claims necessarily involve a violation of a right, privilege or immunity, attorney's fees are appropriate under *Farrar* only when plaintiff's victory entails something more than merely a determination that a constitutional guarantee was infringed."

93 F.3d at 361 (citation omitted). Here, Respondent succeeded only in a mere determination that a constitutional guarantee was infringed without any harm to him or the public.

Briggs also involved a claim of excessive force in which the plaintiff unsuccessfully sought compensatory and punitive damages against the officer. As in Respondent's case, it likewise involved a mixed verdict. 93 F.3d at 358. The jury concluded that there had not been an unlawful arrest, but that the officer had used excessive force for which the plaintiff received nominal damages. *Id.* Even using Justice O'Connor's test from her lone concurrence, the court determined that the trial court was justified in refusing to award attorneys' fees, despite the

status as a "prevailing party." *Id.* at 361. Similarly, Respondent's case involves a situation in which the only reasonable fee is no fee at all.

Respondent's situation is further contrasted against that presented in *Wilcox v. City of Reno*, 42 F.3d 550 (9th Cir. 1994) wherein the plaintiff achieved a successful result *beyond* monetary damages. The jury determined a Reno Police Department policy to be unconstitutional and to have proximately caused the plaintiff's injuries. *Wilcox*, 42 F.3d at 555-56. The initiation of the suit in *Wilcox* caused the City Attorney and the Police Chief to: (a) take action on the use of force policy; (b) discipline a defendant officer; and (c) withdraw as legal representative of the disciplined officer. *Wilcox*, 42 F.3d at 552-53. None of these bases are present in this case.

On review of the fee award in *Wilcox*, the Ninth Circuit analyzed the *Farrar* ruling. 42 F.3d at 554-55. In interpreting *Farrar*, the Ninth Circuit stated:

> . . . *Farrar* teaches that district courts, in the exercise of their discretion, should consider the extent of success in calculating a fee award. When the sole purpose of the civil rights claim is the recovery of money damages, a failure to obtain a judgment awarding actual damages is a strong indication of a low degree of success, because "the awarding of nominal damages . . . highlights the plaintiff's failure to prove actual, compensable injury." Thus, if a lawsuit achieves nothing other than an award of nominal damages, the prevailing party *might* deserve to "receive no attorney's fees at all."
>
> *Farrar* therefore teaches that an award of nominal damages is not enough. **If a district**

> **court chooses to award fees after a judgment for only nominal damages, it must point to some way in which the litigation succeeded, in addition to obtaining a judgment for nominal damages**. If the lawsuit achieved other tangible results – such as sparking a change in policy or establishing a finding of fact with potential collateral estoppel effects – such results will, in combination with an enforceable judgment for a nominal sum, support an award of fees.

Wilcox, 42 F.3d at 554-55 (citations omitted; underscore in original, bold supplied). Here, Respondent's lawsuit did not succeed in any way other than a technical or Pyrrhic victory and a nominal damage award of $1.

In distinguishing *Farrar*, the Ninth Circuit explained that the jury found the Reno police department's policy to be unconstitutional and to have proximately caused the plaintiff's injuries. *Wilcox*, 42 F.3d at 555-56. It also noted how the trial court concluded:

> Exposing an unconstitutional policy of this sort within the city police department does a great deal more than a finding that a plaintiff's rights have been infringed upon in some unspecified way. The police department itself, and the community at large benefit from a finding of this sort. . . .

Wilcox, 42 F.3d at 556 (quoting district court transcript). Here, however, the trial court found no such tangible effect on Spokane Police Department policies caused by the jury's verdict. Indeed, the 42 U.S.C. § 1983 claims against the City were *dismissed* at the end of plaintiff's case-in-chief because no evidence supported the Respondent's claims. The litigation did not spark "a change in

policy or establish a finding of fact with potential collateral effects." *See Wilcox*, 42 F.3d at 555.

Moreover, the Ninth Circuit recently reinforced the concept that the catalyst theory alone cannot support a fee award pursuant to 42 U.S.C. § 1988. *Bennett v. Yoshina*, ___ F.3d ___, 2001 WL 880856 (Aug. 7, 2001) (Hawaii passed law that did what plaintiffs' lawsuit sought to do). The *Bennett* court relied upon this Court's recent opinion in *Buckhannon Board & Care Home, Inc. v. West Virginia Dep't of Health & Human Resources*, ___ U.S. ___, 121 S.Ct. 1835 (May 29, 2001):

> We hold that to qualify as a "prevailing party" under 42 U.S.C. § 1988 a party must obtain a "judicially sanctioned change in the legal relationship of the parties."

Bennett, 2001 WL 880856 at *3 (quoting *Buckhannon* at 121 S.Ct. at 1840). When a plaintiff seeks relief only as a catalyst (*i.e.*, "achieve[d] the desired result because the lawsuit brought a voluntary change in defendant's conduct."), they are not entitled to attorneys' fees as the "prevailing party." *Bennett*, 2001 WL 880856 at *1 (quoting *Buckhannon* at 121 S.Ct. at 1838). In addition to failing financially, Respondent's lawsuit did not effectuate any change whatsoever.

Although *Buckhannon* involved whether a litigant was a "prevailing party," this Court reiterated that there are still circumstances in which a "prevailing party" should not recover fees. 121 S.Ct. at 1840, n.6 (citing *Farrar*, 506 U.S. at 115-16). This is such a case. Simply put, Respondent's verdict was the classic "technical" or Pyrrhic victory. He sought only money damages for himself –

some of which were not even contested, other than that Petitioner did not cause them. The jury awarded Respondent no damages.

Respondent began his two-and-a-half-year march to trial by making a $500,000 claim only to have it end with a $1 nominal damage award. He did not act as a private attorney general. He did not seek declaratory or injunctive relief. His lawsuit aimed high and fell far short. Respondent's utter lack of success precludes an attorneys' fee award pursuant to this Court's opinion in *Farrar*; it was an abuse of discretion to award any fee. As the dissent aptly noted at the Court of Appeals:

> Such a judgment cannot deter misconduct any more than a bolt of lightning can; its results might be devastating, but it teaches no valuable lesson because it carries no discernable meaning.

App. 30 (quoting *Farrar*, 506 U.S. at 122 (O'Connor, J., concurring)).

VII. CONCLUSION

For the reasons stated above, this Petition for a Writ of Certiorari to review the decision of the Washington State Supreme Court should be granted.

DATED: August 17, 2001.

Respectfully Submitted,

City of Spokane

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IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

AARON C. ERMINE, Respondent, v. CITY OF SPOKANE; JOHN DOE BARRINGTON and JANE DOE BARRINGTON, husband and wife and the marital community composed thereof, Petitioners.	)	No. 69680-2 EN BANC Filed May 24, 2001

MADSEN, J. – The petitioner maintains that the trial court abused its discretion when the court awarded attorney's fees pursuant to 42 U.S.C. § 1988 after plaintiff was awarded only nominal damages of $1 on his 42 U.S.C. § 1983 use of excessive force claim. The Court of Appeals affirmed the trial court's award of fees. We affirm the Court of Appeals.

FACTS

Respondent Aaron Ermine sued the City of Spokane and Spokane Police Officer Jeffrey Barrington, alleging use of excessive force in making an arrest, negligence, false arrest, and violation of his federal constitutional rights. Ermine's suit arose from events occurring March 24, 1995, when Barrington arrested Ermine for obstructing a public servant and resisting arrest. On that day, Ermine was a passenger in a car involved in a high-speed

chase with the Spokane police. Ermine testified that he tried to get the driver to stop and also tried to jump from the car several times but was unable to do so. After the car was driven over a traffic median and through a Spokane park, it became disabled and stopped. Ermine and the driver both got out of the car. The driver fled.

According to Ermine, he put his hands up and began walking to the back of the car. Officer Barrington yelled "Get down on the ground." I Verbatim Report of Proceedings (RP) at 76. Ermine said he began to get down on one knee when Barrington grabbed him by the back of his head, slammed him down onto the concrete, and hit him several times in the back of the head and the neck. Ermine testified that he cupped his hands over his head. *Id.* at 77. He testified that while he was on the ground, Officer Barrington said "That will teach you to f--- with the cops." I RP at 79.

According to Officer Barrington, when he yelled at Ermine to get down on the ground Ermine refused to obey the command and instead continued toward Barrington. Officer Barrington attempted to place Ermine in "a left arm control" in the street, but Ermine began to pull away, flailing his right arm, and Barrington had a difficult time trying to maintain his hold. II RP at 190-92. Officer Barrington then attempted to prevent Ermine from running away or striking Barrington by taking Ermine to the ground in a "left arm control." II RP at 190. Ermine continued to struggle, rolling over, kicking, and swinging his arms. Barrington gave Ermine a series of "open palm strike[s]" and a "knee strike" but was still unable to control Ermine enough to handcuff him until another officer arrived. II RP at 195-99. Together, the officers

handcuffed Ermine, and arrested him for obstructing a police officer and for resisting arrest.

Ermine was injured during the encounter, and was taken to a hospital by ambulance. There, he received treatment and pain medication for injuries to his face, elbow, and back.

In May 1996, Ermine filed a claim with the City of Spokane (City) seeking $500,000 in damages for violation of his civil rights, false arrest, and assault and battery. Although not in the record, the City obviously denied the claim.[1] In January 1997, Ermine filed suit against the City and Officer Barrington, claiming use of excessive force, negligence, and false arrest. Ermine also brought a claim under 42 U.S.C. § 1983, alleging that Barrington's use of excessive force violated his federal rights under the First, Fourth, Fifth, and Fourteenth Amendments. He sought unspecified compensatory and punitive damages, and costs including attorney's fees.

The case went to mandatory arbitration on the basis that, as Ermine indicated, the relief sought was a money judgment and the case involved no claim in excess of $35,000. Ermine lost in arbitration, and sought a trial de

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[1] According to Barrington, the City's claims adjuster offered Ermine $1,000 to settle the claim in lieu of suit. Pet. for Review at 3. This offer does not appear in the record except for a reference to it in a letter dated March 13, 1997, by Ermine's counsel making, among other things, an offer to settle the law suit for $10,000. *See* Appendix B to the Petition for Review. The letter and trial briefs, to which the letter is attached, were made part of the record when Clerk Merritt granted the parties' agreed motion for supplemental designation of the clerk's papers.

novo. At trial, at the close of plaintiff's case, the court granted a defense motion for dismissal of the constitutional claim against the City due to lack of evidence that any of Ermine's constitutional rights were violated as a result of any custom, policy or practice of the City. During closing argument at the end of the three day trial, defense counsel asked the jury to award $1,212 in medical expenses, $1,200 for pain and suffering, $1,200 for nightmares and scabs on Ermine's face, and $2,500 in punitive damages.

The jury returned a verdict finding in favor of the defendants on all remaining claims except for a finding in favor of Ermine and against Officer Barrington on the § 1983 claim of use of excessive force. The jury determined Ermine's damages to be zero,[2] however, and also declined to award punitive damages. The trial court granted Ermine's motion for nominal damages[3] and awarded $1 in nominal damages.

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[2] The jury's reasoning is, of course, unknown. One court has suggested three situations where an award of nominal damages might follow a verdict in favor of a plaintiff on a § 1983 excessive force claim. First, during the altercation between the plaintiff-detainee and a police officer, the officer might use both justifiable and excessive force, with injury resulting only from the justifiable force. Second, a jury might conclude that evidence concerning plaintiff's injuries is not credible. Third, nominal damages might be appropriate where the plaintiff's injuries have no monetary value or are insufficient to establish with a more substantial measure of damages with any reasonable certainty. *Briggs v. Marshall*, 93 F.3d 355, 360 (7th Cir. 1996).

[3] If a plaintiff proves the elements of a § 1983 claim, the plaintiff is entitled to at least nominal damages. *Mission Springs,*

Ermine also sought $19,840 in attorney's fees. The trial court first distinguished *Farrar v. Hobby*, 506 U.S. 103, 113 S. Ct. 566, 121 L. Ed. 2d 494 (1992), where no fees were allowed when the plaintiff obtained only nominal damages, saying that *Farrar* involved a claim for $17 million from six defendants, 10 years of litigation and two trips to the Court of Appeals. Then the court said it could not ignore the jury's verdict in favor of Ermine, and reasoned that it had to consider the purpose of §§ 1983 and 1988 to discourage discrimination. The court considered the need for citizens to vindicate their civil rights. The court then said that under *Farrar*, in light of the jury's verdict, it had no choice but to reduce the attorney's fees, but that "some fairly substantial attorney fees are appropriate." III RP at 406.

Barrington appealed the award of attorney's fees. The Court of Appeals affirmed. *Ermine v. City of Spokane*, 100 Wn. App. 115, 996 P.2d 624 (2000). Barrington's petition for discretionary review by this court was granted.

ANALYSIS

Under 42 U.S.C. § 1988, a trial court may award reasonable attorney's fees to a party who prevails in a federal civil rights action under § 1983. An attorney's fee award under 42 U.S.C. § 1988 is reviewed under an abuse of discretion standard; discretion is abused when its exercise is manifestly unreasonable or based on untenable

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Inc. v. City of Spokane, 134 Wn.2d 947, 971, 954 P.2d 250 (1998) (citing *Carey v. Piphus*, 435 U.S. 247, 266, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978)).

grounds or reasons. *Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 935 P.2d 555 (1997).

Officer Barrington contends that under *Farrar*, the only reasonable attorney's fee here is no fee. He argues that the Court of Appeals misapplied *Farrar* and relied on other cases that do not support an award of fees to Ermine. Ermine counters that the trial court correctly followed *Farrar*.

In *Farrar*, the United States Supreme Court held first that a party who recovers nominal damages on a § 1983 claim is a prevailing party for purposes of an attorney's fees award under § 1988. Then, the Court turned to the question whether attorney's fees were awardable where the plaintiffs in the case, who sought $17 million in compensatory damages, obtained only $1 in nominal damages. The jury had found that one of six defendants had deprived one of the plaintiffs of a civil right, but in an answer to a special interrogatory found that the defendant's conduct was not a proximate cause of any damages suffered by the plaintiff. *Farrar*, 506 U.S. at 106.

Prior to its decision in *Farrar*, the Court's cases had established that the level of plaintiff's success is a relevant factor in determining the amount of fees to be awarded, and the Court had acknowledged congressional intent that a prevailing plaintiff should ordinarily be awarded attorney's fees unless special circumstances would make an award unjust. *See Hensley v. Eckerhart*, 461 U.S. 424, 429-30, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983). The level of plaintiff's success was recognized as one of a number of factors used to determine an appropriate fee

award.[4] In *Hensley*, the Court addressed the question whether a partially prevailing party could recover an attorney's fee for legal services on unsuccessful claims, and the Court emphasized that in such a case the extent of a plaintiff's success is the crucial factor in determining the proper attorney's fees award under § 1988. *Hensley*, 461 U.S. at 440. The Court explained that where the plaintiff failed to prevail on a claim unrelated to the successful claim, the hours spent on the unsuccessful claim should be excluded when considering the amount of the fee. *Id.* Where related claims are involved, a plaintiff obtaining substantial relief should not have the fee reduced simply because not each contention was adopted by the district court. *Id.* If, however, the plaintiff achieves only limited success, the district court should award fees

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[4] The 1976 House and Senate Reports addressing § 1988 refer to 12 factors, set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir.1974), as appropriate standards for determining a fee award. These factors are:

> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) *the amount involved and the results obtained;* (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Hensley v. Eckerhart, 461 U.S. 424, 430 n.3, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983) (citing *Johnson*, 488 F.2d at 717-19) (emphasis added).

only in an amount that is reasonable in relation to the results obtained. *Id.*

Then, in *Farrar*, the Court reasoned that the degree of success may, in some cases, go to the *availability* of attorney's fees, and not just to the proper *amount*. In *Farrar*, the district court had calculated attorney's fees based upon a reasonable hourly rate multiplied by the number of hours reasonably spent on the litigation. *See Farrar*, 506 U.S. at 114. The Supreme Court noted that this approach failed even to follow *Hensley*. *Id.* The Court then stated that the district court failed to engage in any measured exercise of discretion, reasoning that " '[w]here recovery of private damages is the purpose of . . . civil rights litigation, a district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought.' " *Id.* (quoting *City of Riverside v. Rivera*, 477 U.S. 561, 585, 106 S. Ct. 2686, 91 L. Ed. 2d 466 (1986)) (Powell, J., concurring in judgment). The Court said:

> Having considered the amount and nature of damages awarded, the [trial] court may lawfully award low fees or no fees without reciting the 12 factors bearing on reasonableness, see *Hensley*, 461 U.S., at 430 n.3, or multiplying "the number of hours reasonably expended . . . by a reasonable hourly rate," *id.*, at 433.

Farrar, 506 U.S. at 115.

The Court in *Farrar* stated, "[i]n some circumstances, even a plaintiff who formally 'prevails' under § 1988 should receive no attorney's fees at all. A plaintiff who seeks compensatory damages but receives no more than nominal damages is often such a prevailing party." *Id.*

The court said that "the awarding of nominal damages . . . highlights the plaintiff's failure to prove actual, compensable injury." *Id.*

The Court concluded: "When a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief . . . the only reasonable fee is usually no fee at all." *Id.* Thus, where the plaintiff seeks recovery of private damages, but obtains only nominal damages, the trial court may decline to award attorney's fees or award a low fee without considering the 12 *Johnson* factors.

As federal courts have recognized, *Farrar* does not set forth a per se rule that attorney's fees are improper when only nominal damages are obtained. *See, e.g., Milton v. City of Des Moines,* 47 F.3d 944, 946 (8th Cir. 1995); *Wilcox v. City of Reno,* 42 F.3d 550, 554 (9th Cir. 1994). Many of the federal Courts of Appeals have relied on Justice O'Connor's concurrence in *Farrar* for guidance in determining whether a prevailing party awarded nominal damages has achieved only a technical or de minimis recovery making an attorney's fee award inappropriate. *E.g., Cabrera v. Jakabovitz,* 24 F.3d 372 (2d Cir. 1994); *Johnson v. Lafayette Fire Fighters Ass'n Local 472,* 51 F.3d 726 (7th Cir. 1995); *Briggs v. Marshall,* 93 F.3d 355 (7th Cir. 1996); *Jones v. Lockhart,* 29 F.3d 422 (8th Cir. 1994); *Morales v. City of San Rafael,* 96 F.3d 359 (9th Cir. 1996), *amended by* 108 F.3d 981 (9th Cir. 1997); *Phelps v. Hamilton,* 120 F.3d 1126 (10th Cir. 1997); *Brandau v. Kansas,* 168 F.3d 1179 (10th Cir. 1999); *cf. Sheppard v. Riverview Nursing Ctr., Inc.,* 88 F.3d 1332 (4th Cir. 1996) (when applying *Farrar* in the context of a Title VII mixed motive case); *Garcia v. City of Houston,* 201 F.3d 672 (5th Cir. 2000) (same).

Justice O'Connor joined the majority in *Farrar* as the fifth vote,[5] and also separately wrote to explain more fully why, in her opinion, denial of fees was appropriate: "When the plaintiff's success is purely technical or *de minimis*, no fees can be awarded. Such a plaintiff either has failed to achieve victory at all, or has obtained only a Pyrrhic victory for which the reasonable fee is zero." *Farrar*, 506 U.S. at 117 (O'Connor, J., concurring). However, Justice O'Connor reasoned, not all nominal damage awards are merely technical victories, and she suggested three factors which help to identify cases where the plaintiff has achieved a level of success justifying an attorney's fees award even though obtaining only nominal damages: (1) whether or not there is a substantial difference between the judgment recovered and the recovery sought; (2) the significance of the legal issue on which the plaintiff claims to have prevailed; and (3) whether the success might be considered material because it has also accomplished some public goal. *Id.* at 120-22 (O'Connor, J., concurring).

We applied *Farrar* in *Sintra*, but did not use these factors in assessing whether the plaintiff's success was merely technical or de minimis. While we recognize that Justice O'Connor's separate concurring opinion is not binding, we find, as have other courts, that the factors

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[5] The Court of Appeals erroneously characterized the decision in *Farrar* as a plurality. *Ermine v. City of Spokane*, 100 Wn.App. 115, 120, 996 P.2d 624 (2000). A couple of other courts have made the same mistake. *Gudenkauf v. Stauffer Communications, Inc.*, 158 F.3d 1074, 1078 (10th Cir. 1998); *Lewis v. Am. Foreign Serv. Ass'n*, 846 F. Supp. 77, 83 n.9 (D.D.C. 1993).

she suggests are helpful in determining whether a plaintiff who has received only nominal damages on a § 1983 claim falls within the "narrow category of cases [under *Farrar*] where no attorney's fees should be awarded." *Phelps v. Hamilton*, 120 F.3d 1126, 1131 (10th Cir. 1997).

Turning to the first factor, the difference between the judgment recovered and the judgment sought, the City focuses on Ermine's initial claim for $500,000. It is apparent to this court, however, that this case involved a small claim. Ermine sought less than $35,000 through arbitration, and at trial requested that the jury award only $6,112. The Seventh Circuit has noted the difference between a case, like *Farrar*, where the plaintiff was "aiming high and fell far short . . . in the process inflicting heavy costs on his opponent and wasting the time of the court," and a case which "was simply a small claim- . . . tried accordingly." *Hyde v. Small*, 123 F.3d 583, 585 (7th Cir. 1997).

In a similar vein, the court in *Brandau v. Kansas*, 168 F.3d 1179 (10th Cir. 1999) upheld an award of attorney's fees and expenses of $41,598.13 where the plaintiff prevailed on a Title VII hostile work environment sexual harassment claim,[6] and the jury awarded her $1 nominal damages. With regard to the first of Justice O'Connor's factors, the Tenth Circuit noted the district court's determination that the plaintiff sought only 21 months in back pay and $50,000, in contrast to the $17 million in *Farrar*,

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[6] The legislative history of § 1988 indicates that standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act. *Hensley*, 461 U.S. at 433 n.7.

and also noted the fact that that plaintiff's suit was not protracted. *Id.* at 1182. In *Jones v. Lockhart*, 29 F.3d 422 (8th Cir. 1994), the plaintiff was a state prisoner who brought a § 1983 action against prison officials and prevailed on his claim of excessive force. He was awarded nominal damages of $1 and punitive damages of $1, and the district court awarded $25,000 in attorney's fees. On appeal, the Eighth Circuit upheld the attorney's fees award, relying on Justice O'Connor's factors for guidance. Considering the first factor, the court observed that while there was a discrepancy between the amount sought and that recovered ($860,000 and $1), "it pales in comparison to the discrepancy presented in *Farrar*." *Id.* at 424.

The difference between the judgment obtained and the relief sought in this case, as in *Brandau* and *Jones*, is not of the same magnitude as that in *Farrar*. Ermine's request for slightly over $6,000 was modest indeed in comparison to the relief sought in *Farrar*. And the difference between the amount he sought and that which he obtained does not reflect the degree of disparity that existed in *Farrar*.

The second factor is the significance of the legal issue on which Ermine prevailed. In *Jones*, the Eighth Circuit reasoned that the "vindication of the constitutional right to be free from cruel and unusual punishment is a significant legal issue in contrast to the injury to a business interest alleged in *Farrar*." *Id.*; *see Lucas v. Guyton*, 901 F. Supp. 1047, 1055 (D.S.C. 1995) (death row inmate's excessive force claim against correctional officers; "the constitutional right to be free from cruel and unusual punishment . . . is one of the premises upon which this

great nation was founded and that right continues to distinguish this nation today"); *cf. Piper v. Oliver*, 69 F.3d 875, 877 (8th Cir. 1995) (the right to be free from physical detention is a significant one). We similarly conclude that the legal issue involved here is significant. Unlawful physical beatings by the government's agents are abhorrent, and citizens are entitled to be free of such conduct. As Judge Posner, in an opinion written in a case involving an award of $500 for false arrest, reasoned:

> The district court based its decision to award no fees on the small size of the verdict and the fact that the case broke no new ground in the law of police abuses. If these are sufficient grounds it means that routine police misconduct that, although unconstitutional, is neither harmful enough to support a large award of compensatory damages nor malicious enough to justify an award of punitive damages is, as a practical matter, beyond the reach of the law. It is impossible, unless there is an expectation of a fee award (and often not then), to interest a competent lawyer in bringing a suit in federal court to recover a small amount of damages unless the plaintiff is a rich person willing to finance the suit out of his own pocket rather than by means of a contingent-fee contract, the normal way in which tort suits are financed in this country. Yet the cumulative effect of petty violations of the Constitution arising out of the interactions between the police (and other public officers) and the citizenry on the values protected by the Constitution may not be petty, and if this is right then the mere fact that a suit does not result in a large award of damages or the breaking of new constitutional ground is not a good

> ground for refusing to award any attorneys' fees.

Hyde v. Small, 123 F.3d 583, 585 (7th Cir. 1997).

The second factor has also been seen as involving an assessment of how successful plaintiff was, given the defendants sued and the issues raised. *E.g., Muhammad v. Lockhart*, 104 F.3d 1069, 1070 (8th Cir. 1997); *see Farrar*, 506 U.S. at 121 (O'Connor, J., concurring) (plaintiff recovered only $1 from just one of six defendants, and the only one the jury found did not engage in a conspiracy). As the trial court observed, *Farrar* involved a claim for $17 million from six defendants, 10 years of litigation and two trips to the Court of Appeals. As we have noted, the jury found only one defendant violated the plaintiff's civil rights, and found that that violation did not proximately cause any of the plaintiff's damages. Here, the trial lasted just three days,[7] and Ermine was successful in establishing that Officer Barrington used excessive force. Additionally, in contrast to *Farrar*, there were no special interrogatories to the jury, and thus no jury finding that the constitutional violation did not proximately cause plaintiff's injuries.

The third factor described by Justice O'Connor entails inquiry into whether Ermine's success might be considered material because it has also accomplished some public goal. Ermine relies upon the purpose of § 1988 to provide an incentive for competent and skilled attorneys to take on unpopular cases and indigent clients,

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[7] Although the process in this case involved mandatory arbitration, plaintiff did not cause the need for arbitration.

thereby acting as "private attorney general." He also urges that the nominal award he obtained has a deterrent effect, serving the public purpose of helping to protect him and others from future similar unlawful conduct.

While, as Justice O'Connor said, § 1988 is not " 'a relief Act for lawyers,' " it is, as she also said, a tool that ensures vindication of important civil rights by making fees available under a private attorney general theory. *Farrar*, 506 U.S. at 122 (O'Connor, J., concurring) (quoting *City of Riverside v. Rivera*, 477 U.S. at 588 (Rehnquist, J., dissenting)). The Court has quoted: " 'If the citizen does not have the resources, his day in court is denied him; the congressional policy which he seeks to assert and vindicate goes unvindicated; and the entire Nation, not just the individual citizen, suffers.' " *City of Riverside v. Rivera*, 477 U.S. at 575 (plurality) (quoting 122 Cong. Rec. 33313 (1976) (remarks of Sen. Tunney)).

The Eighth Circuit in *Jones*, 29 F.3d at 424, said that civil rights litigation serves an important public goal, vindicating policy that Congress intended to be of the highest priority. This can be said, however, with regard to any constitutional claim under § 1983 on which plaintiff prevails, and *Farrar* indicates attorney's fees are not always awardable in § 1983 actions even where plaintiff is a prevailing party. It may be that small claims vindicating civil rights to be free from police abuse may have a cumulative effect serving the public goal of fostering a society where law enforcement officers preserve rather than violate individual constitutional rights. *See Hyde v. Small*, 123 F.3d at 585. However, this kind of reasoning could be applied to virtually any constitutional violation,

and thus cannot support, under Justice O'Connor's third factor, an attorney's fees award.

Moreover, Ermine's case effected no change in government policies or practices, in contrast to cases where courts have found the third factor satisfied where the defendant changed its unconstitutional policies or practices as a result of a § 1983 suit. For example, the Ninth Circuit upheld an attorney's fees award of over $66,000 in a nominal damages excessive force claim, finding that the third factor favored an award because the jury determined a city policy to be unconstitutional, and during the course of the litigation the city disciplined the offending officer and modified its use of force policy. *Wilcox*, 42 F.3d at 556-57. The city's police chief even testified at trial that he used a video of the event as a training device to show what force was not acceptable. In *Johnson*, 51 F.3d 726, nonunion firefighters brought a § 1983 action challenging the constitutionality of a provision of a collective bargaining agreement. They sought declaratory and injunctive relief and nominal damages, and were awarded declaratory relief, and $33,096.96 in costs and attorney fees. On appeal, the Seventh Circuit upheld the fees award. Concerning the third factor suggested by Justice O'Connor, the court reasoned that a public goal was achieved because the union had been out of compliance with constitutional requirements for six years and only modified its procedures after commencement of the nonunion fire fighters' suit; plaintiffs' success assured that future nonmembers would be afforded the required procedures. *Id.* at 726.

Although not all of the factors favor an attorney's fees award, they are, as we have said, useful as guidance.

There is no requirement that all three factors affirmatively support an award. Nor are they necessarily the only factors which may be relevant.

In assessing the propriety of the trial court's award of attorney's fees, we emphasize that the standard of review is abuse of discretion. As the court said in *Piper*, "[t]he deferential abuse of discretion standard has been and remains paramount to our review of a . . . court's decision to grant or deny attorney's fees in a nominal damage case." *Piper*, 69 F.3d at 877. The trial court applied *Farrar*, and awarded only half the attorney's fees requested, acknowledging the importance of the issue on which Ermine succeeded, while also acknowledging the nominal nature of the award. While reasonable minds might differ, we do not find the trial court's decision to half the award to be an abuse of discretion.

Ermine requests an award of reasonable attorney's fees to reimburse him for responding to Officer Barrington's appeal. We grant reasonable attorney's fees to him for successfully defending his award of attorney's fees in this civil rights litigation. *See Aubin v. Fudala*, 821 F.2d 45 (1st Cir. 1987); *Cunningham v. County of Los Angeles*, 879 F.2d 481, 490 (9th Cir. 1988); *Fewquay v. Page*, 907 F.2d 1046 (11th Cir. 1990).

The Court of Appeals is affirmed.

/s/ Alexander, C.J.
/s/ Smith, J.
/s/ Johnson, J.
/s/ Sanders, J.
/s/ Madsen, J.
/s/ Ireland, J.
/s/ Bridge, J.
/s/ Chambers, J.
/s/ Owens, J.

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION THREE

Ermine v. City of Spokane, 100 Wn. App. 115, 996 P.2d 624 (2000)

[No. 18253-3-III. Division Three. March 28, 2000.]

AARON C. ERMINE, Respondent, v. THE CITY OF SPOKANE, ET AL., Appellants.

SWEENEY, J. dissents by separate opinion.

Nature of Action: The plaintiff sought damages from a city and a police officer for false arrest, use of excessive force in making the arrest, negligence, and violation of civil rights.

Superior Court: The Superior Court for Spokane County, No. 97-2-00402-5, Paul A. Bastine, J., on February 9, 1999, entered a judgment on a verdict in favor of the plaintiff on the civil rights claim against the officer and in favor of the defendants on all other counts. Although the jury found that the plaintiff had not sustained damages, the judgment included nominal damages and an award of attorney fees under 42 U.S.C. § 1988 for the civil rights claim.

Court of Appeals: Holding that the trial court did not abuse its discretion in awarding attorney fees based on the nominal damage award, the court affirms the judgment.

James C. Sloan, City Attorney, and Rocco N. Treppiedi and John A. Level, Assistants, for appellants.

Peter D. Poulson of Lacy & Kane, P.S., for respondent.

KURTZ

KURTZ, C.J. – Aaron Ermine filed this action against the City of Spokane and Officer Jeff Barrington seeking damages for injuries sustained in the course of an arrest. Rejecting all but one of Mr. Ermine's claims, the jury returned a verdict against Officer Barrington on Mr. Ermine's 42 U.S.C. § 1983 claim, but awarded no damages. The trial court subsequently awarded nominal damages of $1 and attorney fees under 42 U.S.C. § 1988. Relying on *Farrar v. Hobby*, 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992), and *Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 935 P.2d 555 (1997), the City asserts the trial court abused its discretion by awarding attorney fees to a civil rights plaintiff who recovered only nominal damages. We affirm.

FACTS

On March 24, 1995, Mr. Ermine was a passenger in a car that was involved in a high-speed chase with Spokane police. During the chase, Mr. Ermine rode in the car as an unwilling passenger and made several attempts to get the driver to stop the car. After driving over a traffic median and a curb, the car drove across Franklin Park and came to a stop. Mr. Ermine and the driver got out of the car. The driver fled on foot.

There are two versions of the chain of events related to Mr. Ermine. Mr. Ermine states that he got out of the

car, put his hands up, and started walking toward the back of the car. When Mr. Ermine reached the back of the car, he spotted Officer Barrington who yelled, "Get down on the ground." Mr. Ermine began to kneel, but Officer Barrington grabbed him by the back of the head and slammed his face down to the concrete. Officer Barrington then hit Mr. Ermine several times in the back of the head and the neck area. Officer Barrington continued to hit Mr. Ermine even though he had curled up in a ball to protect himself. While Mr. Ermine was on the ground, Officer Barrington said: "That will teach you to fuck with the cops."

Officer Barrington remembers the events somewhat differently. After the car was disabled, Officer Barrington observed Mr. Ermine walking toward the rear of the car. Officer Barrington yelled, "Police. Get down on the ground." When Mr. Ermine refused to comply with his commands, Officer Barrington made physical contact with Mr. Ermine in an effort to detain him. Specifically, Officer Barrington attempted to place Mr. Ermine under "left arm control," but had a difficult time because Mr. Ermine was swinging and flailing his right arm and trying to tug his left arm free. Officer Barrington gave Mr. Ermine a series of "open palm strikes" and a knee strike, but was unable to control or handcuff Mr. Ermine until Officer Craig Bulkley arrived. Officer Barrington, with Officer Bulkley's assistance, was able to subdue and handcuff Mr. Ermine. The officers arrested Mr. Ermine for obstructing a police officer and resisting arrest. Mr. Ermine was transported by ambulance to Holy Family Hospital and received treatment and pain medication for injuries to his face, elbow, and back.

In May 1996, Mr. Ermine filed a claim for damages against the City and Officer Barrington seeking damages of $500,000 for violation of his civil rights, false arrest, and assault and battery. In January 1997, Mr. Ermine brought suit against Officer Barrington and the City of Spokane alleging false arrest, use of excessive force in making the arrest, and negligence. Additionally, Mr. Ermine brought a claim under 42 U.S.C. § 1983, alleging that Officer Barrington's use of excessive force violated Mr. Ermine's rights under the First, Fourth, Fifth, and Fourteenth Amendments to the United States Constitution. Mr. Ermine sought unspecified compensatory and punitive damages in his complaint. The matter went to mandatory arbitration. Mr. Ermine lost in arbitration and sought a de novo trial in superior court.

During his closing argument at trial, Mr. Ermine requested $1,212 in medical expenses, $1,200 for pain and suffering, and $2,500 in punitive damages. The jury returned a verdict in favor of the City on all counts. The jury also found in favor of Officer Barrington on all counts except the count alleging excessive force under 42 U.S.C. § 1983. However, the jury also determined Mr. Ermine's damages to be zero. Based on the jury's verdict, Mr. Ermine requested $555 for nominal damages and $19,840 for attorney fees. The trial court awarded Mr. Ermine $1 in nominal damages and 50 percent of the attorney fees requested. The court denied the City's motion for reconsideration.

ANALYSIS

The City contends the court abused its discretion by awarding attorney fees to Mr. Ermine because no fees should be awarded to a civil rights plaintiff recovering only nominal damages. Relying on *Farrar* and *Sintra*, the City asserts the court should have given primary consideration to the amount of damages sought by Mr. Ermine as compared to the nominal damages awarded. The City maintains that a fee award was improper because Mr. Ermine failed to establish any degree of success in comparison to the relief sought.

Under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988(b), trial courts are granted the discretion to award attorney fees to prevailing parties.[1] A plaintiff awarded nominal damages is a prevailing party under § 1988. *Farrar v. Hobby*, 506 U.S. 103, 112, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992). However, a prevailing party is not always entitled to an award of attorney fees; in some circumstances it may be an abuse of discretion to award attorney fees to a plaintiff who seeks compensatory damages but receives only nominal damages. *Id.* at 115. The question we must address is whether the court abused its discretion in awarding fees to Mr. Ermine, a

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[1] 42 U.S.C.A. § 1988(b) (1994) reads: "In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." (Footnote omitted.)

plaintiff receiving only nominal damages of $1.00. A court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. *Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 664, 935 P.2d 555 (1997).

In *Farrar*, the plaintiffs brought an action under 42 U.S.C. § 1983 and § 1985 alleging due process violations arising out of the state's closure of a private school for troubled teenagers. *Farrar*, 506 U.S. at 105-06. The plaintiff in *Farrar* sought damages of $17 million, but was awarded only $1 in nominal damages. The *Farrar* court reversed the district court's award of attorney fees, concluding "[w]hen a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, the only reasonable fee is usually no fee at all." *Farrar*, 506 U.S. at 115. (citations omitted). The *Farrar* court further determined that " '[w]here recovery of private damages is the purpose of . . . civil rights litigation, a district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought.' " *Farrar*, 506 U.S. at 114. (quoting *City of Riverside v. Rivera*, 477 U.S. 561, 585, 106 S.Ct. 2686, 91 L.Ed.2d 466 (1986) (Powell, J., concurring)). In other words, "the degree of success" is the most critical factor in determining the reasonableness of a fee award to a prevailing party. *Farrar*, 506 U.S. at 114.

Farrar is a plurality opinion, with the fifth and decisive vote coming from Justice O'Connor, who stated her understanding of *Farrar* in a special concurrence. Justice

O'Connor agreed with the plurality opinion that " 'a technical victory may be so insignificant . . . as to be insufficient' to support an award of attorney's fees." *Farrar*, 506 U.S. at 117 (O'Connor, J., concurring) (quoting *Texas State Teachers Ass'n v. Garland Independent Sch. Dist.*, 489 U.S. 782, 792, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989)). She added, however, that § 1988 "is a tool that ensures the vindication of important rights, even when large sums of money are not at stake, by making attorney's fees available under a private attorney general theory." *Farrar*, 506 U.S. at 122 (O'Connor, J., concurring). "As narrowed by Justice O'Connor's concurring opinion, therefore, *Farrar* essentially holds that failure to recover more than nominal damages in a § 1983 action is a Pyrrhic or technical victory precluding an award of attorney's fees under § 1988 only when the action serves no public purpose." *Gudenkauf v. Stauffer Communications, Inc.*, 158 F.3d 1074, 1078 (10th Cir.1998).

The Washington Supreme Court applied the *Farrar* analysis in *Sintra*. Sintra brought suit under 42 U.S.C. § 1983 for deprivation of substantive due process rights and unconstitutional taking arising out of the city's enforcement of a housing preservation ordinance. Sintra originally claimed losses of over $100 million, but Sintra's expert at trial estimated the loss at more than $2 million. After seeking millions, Sintra recovered only $3 in nominal damages. Applying the *Farrar* analysis, the *Sintra* court determined that trial courts awarding attorney fees under § 1988 should give primary consideration to the amount of damages sought by the plaintiff as compared to the nominal damages awarded. *Sintra*, 131 Wn.2d at 666. The *Sintra* court reversed the award of fees made by

the trial court because the trial court correctly stated the "central issue," but did not consider this matter a primary factor in its findings and considered other factors such as the difficulty of the case, the undesirability of the case, and the level of skill necessary to properly pursue the case. *Sintra*, 131 Wn.2d at 665.

We find instructive *Wilcox v. City of Reno*, 42 F.3d 550 (9th Cir.1994). In *Wilcox*, the Ninth Circuit affirmed an award of attorney fees of $66,535 even though the plaintiff was awarded only $1 in damages after an officer had punched him twice in the face in the course of an arrest. *Id.* at 551-52. However, the jury had concluded that the City of Reno had a policy that resulted in the use of excessive force and that the policy proximately caused the plaintiff's injuries. *Id.* at 553. The court determined that "*Farrar* therefore teaches that an award of nominal damages is not enough. If a district court chooses to award fees after a judgment for only nominal damages, it must point to some way in which the litigation succeeded, in addition to obtaining a judgment for nominal damage. If the lawsuit achieved other tangible results – such as sparking a change in policy or establishing a finding of fact with potential collateral estoppel effects – such results will, in combination with an enforceable judgment for a nominal sum, support an award of fees." *Wilcox*, 42 F.3d at 555. On the other hand, the court also concluded that the determination of whether to make an award remains with the district court, because "[t]he district court is in the best position to ascribe a reasonable value to the lawyering it has witnessed and the result that lawyering has achieved." *Id.*

In *Farrar,* Justice O'Connor stated, "an award of nominal damages can represent a victory in the sense of vindicating rights even though no actual damages are proved." *Farrar,* 506 U.S. at 121 (O'Connor, J., concurring). Here, the jury found that the Spokane police officer used excessive force under 42 U.S.C. § 1983. But the jury also found that Mr. Ermine suffered no actual damages. The trial judge determined that there was a public purpose in this litigation and that Mr. Ermine's legal victory was not too insignificant to justify an award of attorney fees against the City.

We affirm the judgment of the trial court and award Mr. Ermine attorney fees on appeal.

KATO, J., concurs.

SWEENEY

SWEENEY, J. (dissenting) – I respectfully dissent because neither the United States Supreme Court's decision in *Farrar v. Hobby*[2] nor the Washington State Supreme Court's decision in *Sintra, Inc. v. City of Seattle*[3] supports an award of attorney fees here.

The prevailing party in a 42 U.S.C. § 1983 action is not entitled to an award of fees where recovery of private damages is the sole purpose of the litigation and he or she recovers nothing. *Sintra, Inc. v. City of Seattle,* 131 Wn.2d 640, 665-66, 935 P.2d 555 (1997). This is because

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[2] 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992).

[3] 131 Wn.2d 640, 935 P.2d 555 (1997).

when awarding attorney fees we must give primary consideration to the amount of damages awarded as compared to the amount sought. *Id.*

I dissent reluctantly because I do not agree with the holding in *Farrar.* It fails to implement both the spirit and the letter of 42 U.S.C. § 1983. It is, nonetheless, the law in this state, adopted in *Sintra.* I would therefore reverse the award of attorney fees.

The claim here was for relief under a federal statute, 42 U.S.C. § 1983. We are, therefore, bound by the federal interpretation of this statutory scheme. *Sintra,* 131 Wn.2d at 652. And the question of attorney fees, under precisely the same factual circumstances we are confronted with here, has been addressed by the United States Supreme Court in *Farrar.* The majority holding in *Farrar* is clear. A party may be technically a "prevailing party" according to 42 U.S.C. § 1988 even if he or she recovers only nominal damages. *Farrar v. Hobby,* 506 U.S. 103, 113, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992). Nonetheless, the "most critical" factor for determining the reasonableness of a fee is the degree of success obtained. *Id.* at 114. According to the *Farrar* court, where the claim is for private damages, the court must " 'give primary consideration to the amount of damages awarded as compared to the amount sought.' " *Id.* (quoting *City of Riverside v. Rivera,* 477 U.S. 561, 585, 106 S.Ct. 2686, 91 L.Ed.2d 466 (1986) (Powell, J., concurring)). The necessary conclusion from *Farrar* is that even though a party may be technically "a prevailing party" under § 1988, he or she is not entitled to attorney fees where the claim for compensatory damages is rejected.

Justice O'Connor concurred in the majority opinion in *Farrar* and provided additional grounds for the holding. She writes that "when a plaintiff's victory is purely technical or de minimis, a district court need not go through the usual complexities involved in calculating attorney's fees." *Farrar*, 506 U.S. at 117 (O'Connor, J., concurring). She explains, "where the only reasonable fee is no fee, an award of fees would be unjust; conversely, where a fee award would be unjust, the reasonable fee is no fee at all." *Id.* at 118. Moreover, Justice O'Connor notes that where there is no recovery, there is no award of costs. She notes that § 1988 authorizes payment of fees as part of costs; therefore, no costs, no fees. *Id.* at 119-20.

Justice O'Connor does argue that other factors should be considered when deciding whether to award attorney fees, like a victory which results in no monetary recovery but vindicates significant rights. *Id.* at 121. That position was not, however, adopted by the *Farrar* majority. And, more importantly, there is no finding here of vindication of any right not vindicated by any other successful § 1983 action, where only nominal damages are recovered.

The majority opinion in *Farrar* was accepted in toto by the Washington State Supreme Court in *Sintra*. *Sintra*, 131 Wn.2d at 664-66. It should, therefore, guide our analysis in this case. The primary factor the trial court must consider in awarding fees in a § 1983 action is the degree of success. We judge that degree of success by comparing the claims asserted and the relief sought to the results.

Aaron Ermine asked for both punitive and compensatory damages. He received no compensatory damages,

and no punitive damages. The court in *Sintra* reversed an award of attorney fees under similar circumstances, holding:

> the central issue to be addressed in its consideration of an award of attorney's fees under § 1988 was the degree of success obtained by Plaintiffs, the court did not consider this a primary factor in its findings when entering an award.

Sintra, 131 Wn.2d at 665.

Mr. Ermine sued for $500,000. He offered to settle the case for $10,000 before trial. The case was arbitrated pursuant to mandatory arbitration rules which limit any award to $35,000. The arbitrator found for the City. Mr. Ermine appealed the adverse arbitration award to superior court. A jury, again, rejected his claim for both punitive and compensatory damages.

Mr. Ermine did not ask for injunctive relief. He did not ask for declaratory relief or extraordinary writs. And he made no showing either at trial or during post-trial argument over attorney fees that any of the policies of the Spokane Police Department changed, or had been so much as reconsidered, as a result of his efforts. In short, Mr. Ermine lost this lawsuit.

The later imposition of $1 nominal damages would not send a message other than this claim was not worth much and vindicated no important right. To repeat, all that was sought here was money. And the jury awarded no money.

The trial judge articulated his considerations on the questions of attorney fees, as follows:

> (1) "I think I still have to consider the fact that the jury came back with a verdict in favor of Mr. Ermine."
>
> (2) "I still think that some fairly substantial attorney fees are appropriate[.]"

On reconsideration, the court expanded on its reasons noting that "[i]f I had not considered the factor of the damages, I would have granted substantially more attorney's fees." The court could not articulate because the record discloses no vindication of a substantial right. Indeed, as Justice O'Connor noted: "Such a judgment cannot deter misconduct any more than a bolt of lightning can; its results might be devastating, but it teaches no valuable lesson because it carries no discernable meaning." *Farrar*, 506 U.S. at 122 (O'Connor, J., concurring).

Mr. Ermine may have made a point. But he made no more of a point than any other successful § 1983 litigant makes. And as I read *Farrar* and *Sintra*, that is not enough.

The award of attorney fees is subject to an abuse of discretion standard. The trial judge abuses that discretion when the decision is based upon unreasonable or untenable grounds. *Sintra*, 131 Wn.2d at 664. The trial judge abused his discretion here because the primary consideration required by both *Farrar* and *Sintra* was the plaintiff's degree of success. This was a claim for compensatory and punitive damages, pure and simple. The plaintiff lost at arbitration and lost again before a jury. That is not success. The trial judge, therefore, abused his discretion in awarding fees.

I therefore respectfully and, again, reluctantly dissent.

SUPERIOR COURT, STATE OF WASHINGTON,
COUNTY OF SPOKANE

AARON C. ERMINE, Plaintiff, v. CITY OF SPOKANE, et al. Defendants.	No. 97-2-00402-5 ORDER DENYING DEFENDANTS' MOTIONS FOR: (1) RECONSIDERATION OF DECISION TO AWARD ATTORNEY'S FEES; AND (2) JUDGMENT AS A MATTER OF LAW OR, IN ALTERNATIVE, NEW TRIAL (Filed Feb. 9, 1999)

BASIS

On January 13, 1999, the court considered the following motions: (a) "Defendants' Motion for Judgment as a Matter of Law or, in the Alternative, a New Trial Under CR 59;" and (b) "Defendants' Motion for Reconsideration of December 18, 1998 Decision Regarding Attorney's Fees." The plaintiff appeared by his counsel, Devin Poulson, Lacy & Kane Law Offices, and the defendants appeared by their counsel, Assistant City Attorney Rocco N. Treppiedi.

FINDING

The court, having considered the record with respect to the defendants' motion for reconsideration regarding attorney's fees, and having considered the record and oral argument regarding the defendants' motion for judgment as a matter of law, finds that there is no basis to

grant either of the defendants' motions, and that the motions should be denied.

ORDER

IT IS HEREBY ORDERED that the "Defendants' Motion for Judgment as a Matter of Law or, in the Alternative, a New Trial Under CR 59" and "Defendants' Motion for Reconsideration of December 18, 1998 Decision Regarding Attorney's Fees" are denied, and judgment shall be entered accordingly.

DATED this 8th day of February, 1999.

/s/ Paul A. Bastine
PAUL A. BASTINE, JUDGE
PAUL A. BASTINE

Presented by:

JAMES C. SLOANE
City Attorney

By: /s/ Rocco N. Treppiedi
ROCCO N. TREPPIEDI, WSB #09137
Assistant City Attorney
Attorney for Defendants

Agreed to and Notice of Presentment Waived:

LACY & KANE LAW OFFICES

/s/ Devin Poulson
Devin Poulson, WSB #24245
Attorney for Plaintiff

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
FOR SPOKANE COUNTY

AARON C. ERMINE, Plaintiff, vs. CITY OF SPOKANE and JEFFERY BARRINGTON, Defendants.	No. 97-2-004025 Verdict Form

All questions must be answered, unless otherwise indicated.

I. PLAINTIFF'S CLAIMS.

A. Excessive Force Constitutional Claim.

1. On plaintiff's claim for excessive force against defendant Barrington, the jury finds in favor of:

(PLAINTIFF ERMINE) DEFENDANT BARRINGTON (circle one)

B. Battery.

1. On Plaintiff's claim for battery against the defendants, the jury finds in favor of:

PLAINTIFF ERMINE (DEFENDANTS) (circle one)

C. False Arrest.

1. On plaintiff's claim for false arrest against the defendants, the jury finds in favor of:

PLAINTIFF ERMINE (DEFENDANTS) (circle one)

II. PLAINTIFF'S DAMAGES.

(Complete this section *only if* you have found in favor of the plaintiff against the defendant(s) on any claim(s).)

1. What are the damages to Aaron Ermine for the excessive force constitutional claim? 0

2. If you have found in favor of Aaron Ermine on his constitutional claim for excessive force against Officer Barrington, you may award punitive damages against Officer Barrington. If you have determined to award punitive damages, indicate the amount. 0

3. What are the damages to Aaron Ermine for the battery claim? --

4. What are the damages to Aaron Ermine for the false arrest claim? --

THE FOREGOING CONSTITUTES THE COMPLETE VERDICT OF THE JURY.

DATED this 1 day of December, 1998.

/s/ Alden W. [Illegible]
PRESIDING JUROR

EXHIBIT A

LACY
& [LOGO]
KANE
LAW OFFICES

[Address And Names Omitted In Printing]

March 13, 1997

Rocco N. Treppiedi
Assistant City Attorney
5th Floor Municipal Building
Spokane, Washington 99201-3326

Re: Aaron C. Ermine v. City of Spokane, et al.

Dear Mr. Treppiedi:

Enclosed you will find a Motion and Affidavit For Default. This Motion has been scheduled for April 11, 1997, which should give you plenty of time to prepare an answer. Therefore, I will not agree to any continuance of the default hearing unless you contact me immediately, in which case I will be happy to accommodate your schedule.

Also, from a review of the above file it appears that more than forty days have passed since service of the interrogatories. Please consider this letter my compliance with CR 37. Will you please provide interrogatory responses by March 31, 1997 so that I may save the expense of filing a Motion to Compel.

Also, I thought this might be the appropriate time to discuss settlement of this matter. Previously, I had been negotiating with Mr. Brad Guidinger with Liberty Northwest Insurance. At one point he was willing to settle the

claim for $1,000.00. At that time I was prepared to make a counter offer of $10,000.00. However, because Mr. Guidinger and I were never able to fully discuss the matter, the counter offer was never made. However, at this time I am still willing to extend $10,000.00 as a settlement offer in this case. This offer remains open for twenty days from the date of this letter.

Sincerely,

/s/ Devin Poulson
DEVIN POULSON

DP:wk
Enclosure
c: Aaron C. Ermine

Supreme Court, U.S.
FILED
SEP 20 2001
OFFICE OF THE CLERK

No. 01-314

IN THE

Supreme Court of the United States

JEFFREY BARRINGTON,

Petitioner,

v.

AARON C. ERMINE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

1. After the jury found that Petitioner Jeffrey Barrington, a police officer, violated Respondent Aaron Ermine's constitutional rights by using excessive force, the trial court awarded him $1 in nominal damages. Relying on the factors set forth in Justice O'Connor's concurrence in *Farrar v. Hobby*, the trial court awarded Ermine 50% of his requested attorney's fees. The Washington Supreme Court unanimously affirmed this award. Is this unanimous affirmation in harmony with *Farrar*?

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REASON FOR DENYING THE WRIT

This Court should deny Petitioner's Writ because the unanimous decision of the Washington Supreme Court is in harmony with *Farrar*.

In *Farrar*, this Court declined to adopt a per se rule that says a § 1983 plaintiff who only receives nominal damages is never entitled to an award of attorney's fees.

In this case, the Washington Supreme Court similarly declined to adopt a per se rule that says a § 1983 plaintiff who only receives nominal damages is never entitled to an award of attorney's fees.

Essentially, Barrington argues that the Washington Supreme Court erred because it should have adopted a per se rule because that is what the United States Supreme Court meant to do in *Farrar*. This Court should reject this tortuous argument.

Like this Court did in *Farrar*, the Washington Supreme Court left the decision of whether to award attorney's fees to a nominal-damages plaintiff up to the discretion of the trial court. In contrast to *Farrar* and the Washington Supreme Court, Barrington seeks to wrest all discretion away from the trial court.

By seeking to wrest all discretion away from the trial court, Barrington invites this Court to create new law. In contrast, Ermine respectfully invites this Court deny Barrington's Petition for Writ of Certiorari.

STATEMENT OF FACTS

A. Factual Background.

On March 24, 1995, Ermine was involved in a high speed chase. Ermine's role: unfortunate passenger.

During the chase, Ermine was aware the police were trying to catch the car. He tried to get the driver to stop. Ermine turned the car off, tried pulling the keys out the ignition, tried putting the car in reverse, and threw the car out of gear. He also tried to jump out of the car five or six times when the car would slow around a corner. Damage to the car caused it to roll to a stop in a park.

When the car came to a stop, Ermine got out of the car on the passenger's side, put his hands up, and starting walking towards the back of the car. He was right about at the back of the car when he first saw Barrington.

Barrington yelled, "Get down on the ground!" Obediently, Ermine started to kneel to one knee. As he was down on one knee, Barrington grabbed him by the back of his head and slammed Ermine's face down to the concrete. Barrington then beat him several times in the back of the head and neck area. Ermine covered his head with his hands and curled up in a ball. Barrington continued to beat him.

During the beating, Barrington told Ermine, "That will teach you to fuck with the cops."

At trial, Ermine requested damages in the amount of $6,112. The jury found that Barrington used excessive force.

B. The Reasoning of the Trial Court.

The trial court awarded Ermine $1 in nominal damages and 50% of the attorney's fees requested. This amount equalled $9,920.

The trial court stated:

> I think Farrar stands for the proposition appropriately that one has to look at the award and judge it accordingly. At the same time, I think I still have to consider the fact that the jury came back with a verdict in favor of Mr. Ermine. And that the purpose of these statutory provisions are exactly as [Plaintiff's Counsel] has argued, that the intent is to discourage discriminatory or inappropriate activity on the parts of the citizens who may suffer the consequences of this kind of act.
>
> And so I think that based upon Farrar and based upon the verdict that was rendered, I have no choice but to reduce the attorney's fees. But, I still think that some fairly substantial attorney's fees are appropriate, and that is the basis on which I make the decision of 50 percent.

Later, the trial court stated:

> On the issues for attorney's fees and the motion for reconsideration, clearly the success is an issue there. And I don't think there is any question but what the Court uses that as one of the criteria by which to determine whether or not attorney's fees should be granted.

> Under the circumstances, again, based upon the jury's verdict and trying to weigh the evidence in the appropriate manner, considering the jury's decision and all aspects of that, I can only conclude that there is the right to some attorney's fees.
>
> If I had not considered the factor of the damages, I would have granted substantially more attorney's fees. But having considered that factor and having considered the issue of there only having been a nominal recovery, the attorney's fees in the amount of $10,000 are, in the Court's view, appropriate.

The Washington Supreme Court unanimously affirmed this decision.

ARGUMENT

A. THE WASHINGTON SUPREME COURT'S UNANIMOUS DECISION IS IN HARMONY WITH THE LEGISLATIVE INTENT EXPRESSED IN 42 U.S.C. § 1988 AND WITH THE HOLDING OF *FARRAR v. HOBBY.*

This Court should deny Barrington's Petition for Writ of Certiorari because the Washington State's unanimous decision was based on an accurate view of federal law.

1. *According to Congress, whether to award attorney's fees to a nominal-damages plaintiff is within the trial court's discretion.*

Under the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988, a court may award reasonable attorneys' fees to a prevailing party in a civil rights action. In the absence of special circumstances, a prevailing party should recover reasonable attorneys' fees.[1]

Congress has never amended this statute to say that a court shall not award reasonable attorneys' fees to a prevailing party who receives nominal damages only. Congress still allows a trial court to properly exercise its discretion and award attorneys' fees in nominal-damages cases.

2. *According the United States Supreme Court, whether to award attorney's fees to a nominal-damages plaintiff is within the trial court's discretion.*

In *Hensley v. Eckerhart*,[2] this Court stated that because of the trial court's superior understanding of the litigation and the desirability of avoiding frequent appellant review of what essentially are factual matters, courts have re-emphasized that the trial court has discretion in determining the amount of the fee award. The trial court is in the best position to ascribe a reasonable value to the lawyering it has witnessed and the results that lawyering has achieved.

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1. *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1210 (9th Cir. 1986), *reh'g denied and opinion amended*, 808 F.2d 1373 (9th Cir. 1987) (*citing Hensley v. Eckerhart*, 461 U.S. 424, 429, 76 L. Ed. 2d 40, 103 S. Ct. 1933 (1983).

2. 461 U.S. 424, 437, 103, S. Ct. 1933, 76 L. Ed. 2d 40 (1983).

In *Farrar*, this Court stated:

> Having considered the amount and nature of damages awarded, **the [trial] court may lawfully award low fees** or no fees without reciting the 12 factors bearing on reasonableness, see *Hensley*, 416 U.S., at 430 n.3, or multiplying "the number of hours reasonably expended . . . by a reasonably hourly rate." *id.* at 433.[3]

Thus, because the trial court considered the amount and nature before it awarded 50% of the requested attorney's fees, it lawfully awarded a low fee.

3. *According to Farrar's progeny, whether to award attorney's fees to a nominal-damages plaintiff is within the trial court's discretion.*

Relying on the lone opinion of *Norris v. Sysco Corp.*,[4] a Title VII case, Barrington argues that there is conflict and confusion among the federal court with regards to Justice O'Connor's concurrence.

In *Norris*, the defendant argued that "where a plaintiff recovers nothing at all, the attorney's fee must still be proportional, and that means [] that the only correct proportion would be zero. For that proposition [the defendant] point[ed] to Farrar."[5]

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3. *Farrar v. Hobby*, 506 U.S. 103, 115, 113 S. Ct. 566, 121 L. Ed. 2d 494 (1992) (emphasis added).

4. 191 F.3d 1043 (9th Cir. 1999).

5. *Norris*, 191 F.3d at 1050.

In response to this argument, the Ninth Circuit stated, "[D]efendant's attack is not without force, but, ultimately, it cannot prevail and it is driven back upon its own bulwarks."[6]

Other federal courts have driven back this same argument upon its own bulwarks. They also recognize that *Farrar* does not set forth a per se rule that attorney's fees are improper when only nominal damages are obtained.[7]

Many federal courts rely on Justice O'Connor's concurrence in *Farrar* in determining whether the trial properly exercised its discretion. For example, in *O'Conner v. Huard*,[8] the First Circuit invoked the factors set forth in Justice O'Connor's concurrence in *Farrar* and upheld a lodestar-based award of attorney's fees to a prisoner who received $1 in compensatory damages.

In *Cabrera v. Jakabovitz*,[9] the Second Circuit invoked Justice O'Connor's analysis as controlling.

In *Clark v. Sims*,[10] the Fourth Circuit rejected the argument that a plaintiff who receives only nominal damages necessarily is entitled to no fee award.

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6. *Norris*, 191 F.3d at 1050.

7. *See, e.g., Milton v. City of Des Moines*, 47 F.3d 944, 946 (8th Cir. 1995); *Wilcox v. City of Reno*, 42 F.2d 550, 554. (9th Cir.).

8. 117 F.3d 12, 17-18 (1st Cir. 1997).

9. 24 F.3d 372 (2d Cir. 1994).

10. 28 F.3d 420, 424-25 (4th Cir. 1994).

In *Bridges v. Mallett-Goodwin*,[11] the Sixth Circuit required the trial court to make specific findings why it awarded attorney's fees to the plaintiff who received $1. In this case, the trial court did provide specific findings on how it arrived at its award.

In *Johnson v. Lafayete Fire Fighters Ass'n Loc. 472*,[12] the Seventh Circuit expressly adopted a three-part test, derived directly from Justice O'Conner's *Farrar* concurrence, for determining "whether a prevailing party has achieved a mere technical victory inappropriate for fees."[13]

In *Muhammed v. Lockhart*,[14] the Eighth Circuit used Justice O' Connor's concurrence as guidance and upheld an award of attorney's fees to a prisoner who received a nominal damage award because the prison compelled him to wear ill-fitting shoes or because it violated his procedural due process rights.

In *Morales v. San Rafael*,[15] the Ninth Circuit quoted O'Conner's concurring opinion in *Farrar* with favor. It stated:

> Whether the plaintiff's success is purely technical or de minimis is determined by

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11. 45 F.3d 430 (6th Cir. 1994).

12. 51 F.3d 726 (7th Cir. 1995).

13. *Morales v. City of San Rafael*, 96 F.3d 359, 363 n.7 (9th Cir. 1996).

14. 104 F.3d 106 (8th Cir. 1997).

15. 96 F.3d 359.

> examining other factors in addition to the amount of money damages awarded. Primary among such other considerations is the significance of the legal issues on which the plaintiff claims to have prevailed and the public purpose the plaintiff's litigation served. In her concurring opinion, Justice O'Conner makes it clear that not all nominal damages are de minimis.[16]

In *Phelps v. Hamilton*,[17] the Tenth Circuit proceeded directly to Justice O'Conner's three-factor test set forth in her *Farrar* concurrence for guidance in reversing the district court's denial of all § 1988 fees.

As illustrated by these representative cases, recent federal court of appeals' decisions reflect a continuing heavy reliance on Justice O'Connor's concurring opinion in *Farrar* in determining whether a prevailing party should receive a § 1988 fee award.[18] Contrary to Barrington's argument, widespread confusion on whether to rely on Justice O'Connor's concurrence is absent among the federal courts.

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16. *Morales*, 96 F.3d at 359. *See also Hashimoto v. Dalton*, 118 F.3d 671 (9th Cir. 1997).

17. 120 F.3d 1126 (10th Cir. 1997).

18. Martin A. Schwartz and John E. Kirlin, *Section 1983 Litigation Statutory Attorney's Fees*, Third Edition, Volume 2, 2001-2 Cumulative Supplement, 26-27 (2001).

4. *According to the Washington Supreme Court, whether to award attorney's fees to a nominal-damages plaintiff is within the trial court's discretion.*

In affirming the decision of the trial court to award attorney's fees, the Washington Supreme Court relied upon the three factors set forth in Justice O'Connor's concurring opinion. It stated:

> While we recognize that Justice O'Connor's separate concurring opinion is not binding, we find, as have other court, that the factors she suggests are helpful in determining whether a plaintiff who has received only nominal damages on a § 1983 claim falls within the "narrow category of cases [under *Farrar*] where no attorney's fees should be awarded." *Phelps v. Hamilton*, 120 F.3d 1126, 1131 (10th Cir. 1997).

By relying on these three factors, the Washington Supreme Court took the same approach followed by other courts. Barrington gravely argues that following such an approach is error. Ermine suggests that relying on precedent is not error, but the bedrock of our legal system.

5. *Breaking away from Farrar, Farrar's progeny, and the Washington Supreme Court, Barrington seeks a new rule of law that says, "nominal-damages plaintiffs are never entitled to an award of attorney's fees."*

Barrington must embark upon this unlikely adventure because the three factors set forth in Justice O'Connor's concurrence support the trial's court decision to award 50% of the requested fees.

Under this three-part test, a court should look at (1) the difference between the judgment recovered and the judgment sought, (2) the significance of the legal issue on which the plaintiff prevailed, and (3) the public purpose of the litigation.[19]

This brief will address these factors in order.

a. The difference between the judgment recovered and the judgment sought.

Here, there was not a significant difference between the amount of damages recovered and the amount of damages sought. Firstly, when Ermine requested a trial date, he put it in writing that his case was worth less than $35,000. Thus, Barrington misleads this Court when it argues this was a $500,000 case. By arguing that once Ermine requested a trial *de novo* he was no longer limited to the $35,000 in mandatory arbitration, he is accusing this writer of making a false statement to the trial court. Such is not the case.

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19. *Johnson v. LaFayette Fire Fighters Ass'n Loc. 473*, 51 F.3d 726, 731 (7th Cir. 1995).

If Petitioner's attorneys were truly honest with this court, they would have to admit they treated Ermine's case as a small case because it was a small case.

Second, the fact that Ermine only asked the jury for $6,112 confirms that this case was tried as a small case.

Barrington speculates that Ermine asked for such a modest amount only because the trial court dismissed the proverbial deep pocket of the City of Spokane. RCW 4.96.041(4) takes the force out of this speculation. This statute states that if a court enters a judgment against an employee under 42 U.S.C. § 1981, *et seq.*, the judgment creditor shall seek satisfaction for nonpunitive damages from the local government entity.

Because of this statute and because punitive damages were never available against the City of Spokane, Ermine was in the same position at closing argument as he was before the City of Spokane was officially dismissed. Hence, the City of Spokane's dismissal did not change the amount requested in closing argument one iota.

Third, Barrington misconstrues this Court's use of the word "sought." In *Farrar*, when the Court stated Farrar sought $17 million, it referred to the amount he asked the jury to award him. When Ermine was in front of the ultimate decision-maker, he sought $6,112. Thus, in determining the amount Ermine sought, the relevant figure is the amount he asked the jury to award him.

Fourth, because Ermine sought a modest amount, his case is unlike *Farrar*. Farrar demanded $17 million. After ten years of litigation and two trips to the Courts of Appeals,

he got $1.[20] In contrast, Ermine went through mandatory arbitration and one trial. Ermine did nothing to delay the time it took his case to get to trial.

Finally, the trial court merely did what has been done in other courts. For example, in *Jones v. Lockhart*,[21] Jones requested $860,000 and received $2. The Eighth Circuit awarded Jones $10,000 in attorney's fees, and it stated, "the award does not produce a 'windfall' to counsel."[22]

In *Wilcox v. City of Reno*[23], the jury awarded Wilcox $1 in damages because an officer twice punched him in the face in the course of an arrest. The Ninth Circuit affirmed the award of $66,535 in fees.[24]

In *Gillen v. Gates*,[25] two Los Angeles police officers searched plaintiff's carry on bag and her suitcase. The jury awarded her $1.00 in nominal damages and $300 in punitive damages. Plaintiff's counsel was awarded a fee of $16,562.50.[26]

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20. *Farrar*, 506 U.S. at 111.

21. 29 F.3d 422, 424 (8th Cir 1994).

22. *Jones*, 29 F.3d at 424.

23. 42 F.3d 550 (9th Cir. 1994).

24. *Wilcox*, 42 F.3d at 551.

25. 847 F. Supp. 1475 (C.D. Cal. 1994).

26. *Gillen*, 847 F. Supp. at 1482.

In *Lucas v. Guyton*,[27] the jury found for Lucas in the amount of $0.10.[28] The trial court awarded Lucas reasonable attorney's fees of $29,516.50.[29]

In *Piper v. Oliver*,[30] the trial court awarded Piper $1 in nominal damages because a police officer detained him in violation of his Fourth Amendment rights. The Court awarded $7,500 to cover fees and costs.[31]

In *Brandau v. Kansas*,[32] the trial court awarded Brandau $1 in nominal damages because she prevailed on her hostile work environment sexual harassment claim. Even though the defendant argued that Farrar prevented an award, the Court awarded $41,598.13 in attorney's fees.[33]

In *Carlo v. City of Chino*,[34] the trial court awarded Carlo $1 in nominal damages because defendant deprived her of her constitutional right to make a telephone call.[35] Citing

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27. 901 F. Supp. 1047 (D.S.C. 1995).

28. *Lucas*, 901 F. Supp. at 1050.

29. *Lucas*, 901 F. Supp. at 1051.

30. 69 F.3d 875, 876 (8th Cir. 1995).

31. 69 F.3d 875, 876 (8th Cir. 1995).

32. 168 F.3d 1179 (10th Cir. 1999).

33. *Brandau*, 168 F.3d at 1181.

34. 105 F.3d 493 (9th Cir. 1997).

35. *Carlo*, 105 F.3d at 495.

Farrar, the Ninth Circuit held "Carlo is the prevailing party and as such is entitled to attorney's fees. . . ."[36]

In *Muhammed v Lockhart*,[37] a prisoner received a nominal damage award because the prison compelled him to wear ill-fitting shoes or because it violated his procedural due process rights. The Eighth Circuit upheld the award of attorney's fees to the prisoner.

Like the courts in the eight cases cited above, the trial court in this case was well within its discretionary bounds in awarding attorney's fees to Ermine. By affirming the trial court's award, the Washington Supreme decided properly.

b. The significance of the legal issue on which the plaintiff prevailed.

The United States Supreme Court has recognized that a plaintiff who obtains relief in a civil rights lawsuit, especially "in the area of individual, police misconduct," acts as a private attorney general deterring future violations and that, therefore, consistent with congressional intent, "reasonable attorney's fees . . . are not conditioned upon and need not be proportionate to an award of money damages."[38]

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36. *Carlo*, 105 F.3d at 502.

37. 104 F.3d 106 (8th Cir. 1997).

38. *City of Riverside v. Riviera*, 477 U.S. 561, 574-76, 106 S. Ct. 2686, 2694-95, 91 L. Ed. 2d 466 (1986).

"The right to be free from excessive force is one of the premises upon which this great nation was founded and that right continues to distinguish this nation today."[39]

The Eighth Circuit found, "the vindication of the Constitutional Right to be free from cruel and unusual punishment is a significant legal issue in contrast to the injury to the business interest alleged in Farrar."[40]

Likewise, Ermine's vindication of his Constitutional Right to be free from excessive force is a significant legal issue in contrast to the injury to the business interest alleged in *Farrar*.

6. *The public purpose of the litigation.*

A public goal is accomplished if the plaintiff's victory encourages attorneys to represent civil rights litigants.[41]

"[42 U.S.C. § 1988] is a tool that insures the vindication of important rights, even when large sums of money are not at stake, by making attorney's fees available under a private attorney general theory."[42]

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39. *See Lucas*, 901 F. Supp. at 1055.

40. *Jones*, 29 F.3d at 424.

41. *See, e.g., O'Conner*, 177 F.3d at 18 (noting that the plaintiff's victory was not de minimis because, among other things, it provided an incentive to attorneys to represent civil rights litigants such as the plaintiff and it served as a deterrent to future abuses).

42. *See City of Riverside*, 477 U.S. 561.

Betrayed by his own actions, Barrington insincerely argues that no reasonable person would pay an attorney $9,920 to lose $999. Here, the original judgment was $10,156.22. The amended judgment is $24,050.06. If his own legal fees and cost are added to this amount, Barrington has already spent substantially more money than he is trying save.

Much of our most high minded rhetoric has never assumed that measures to preserve our liberties had to be cost effective.[43]

Vindication of civil rights has an especially high national priority, and, so, some premium over the actual amount of recovery might be allowed by courts in their measured exercise of discretion in cases where the amount recovered is small in comparison with the attorney's fees claimed, so as to give extra incentive to serve as private attorneys in general. In this way, the generalized public purpose of the other wise private suit would be given recognition.[44]

The deterrent effect of a nominal award serves "the public purpose of helping to protect [the plaintiff] and persons like him from being subjected to similar unlawful treatment in the future."[45]

By giving incentive to attorney's to represent civil right litigants and by deterring Barrington from using excessive force in the future, his case served a public purpose.

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43. *Cullens v. Georgia Dept. of Trans.*, 827 F. Supp. 756, 764 (M.D. Ga. 1993).

44. *Cullens*, 827 F. Supp. at 764.

45. *Hashimoto*, 118 F.3d at 678.

In sum, because the trial court did take into consideration the difference between the amount of damages requested and amount of damages, because Ermine did prevail on a significant legal issue and because Ermine's victory furthered an important public policy, the trial court's award of attorney's fees was based on an accurate view of the law. Likewise, the Washington Supreme Court's decision to affirm the award was based upon an accurate view of federal law.

B. REASONABLE ATTORNEY'S FEES AND COSTS.

Ermine is entitled to reimbursement from Barrington for the reasonable attorney's fees Ermine incurred in responding to Barrington's Petition for Writ of Certiorari.

> [When the] defendant appeals and the plaintiff incurs expenses in defending against the appeal that are reasonable even though they are not crowned by complete success, ordinarily he should be entitled to reimbursement of those fees; he had no choice but to incur them or forfeit his victory in the [trial] court.[46]

Ermine also requests attorney's fees and costs pursuant to Supreme Court Rules 42 and 43.

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46. *Ustrak v. Fairman*, 851 F.2d 983, 990 (7th Cir. 1988).

CONCLUSION

Like the *Farrar* decision, the Washington Supreme Court's decision simply stands for the principle that trial courts must evaluate a request for an award of attorney's fees on a case-by-case basis.

The trial court's award of reasonable attorney's fees was based upon an accurate view of the law because:

- the trial court reduced the amount of fees requested by 50%;
- the trial court properly found Ermine vindicated his constitutional rights; and
- the trial court properly found that an award of attorney's fees would further the goals of 42 U.S.C. §§ 1983 and 1988.

Because the trial court's decision was based on an accurate view of the law, the Washington Supreme Court properly affirmed the decision. Thus, Ermine respectfully requests this Court to deny Petitioner's request for a Writ of Certiorari.

Respectfully submitted,

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